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HONORABLE RICHARD A. JONES

FEB 27 2013

AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE KATHERINE OLEJNIK,

CASE NO. 12-GJ-145

Grand Jury Witness,

IN RE MATTHEW DURAN,

CASE NO. 12-GJ-149

Grand Jury Witness.

ORDER

I. INTRODUCTION

This matter comes before the court on motions from grand jury witnesses Katherine Olejnik and Matthew Duran to end their confinement for civil contempt. No. 12-GJ-145, Dkt. # 24; No. 12-GJ-149, Dkt. # 35. For the reasons stated below, the court GRANTS both motions and orders that Ms. Olejnik and Mr. Duran are to be released from custody no later than 4:00 p.m. on February 28, 2013.

II. BACKGROUND

One or more grand juries empaneled in the United States District Court for the Western District of Washington subpoenaed Katherine Olejnik and Matthew Duran to provide testimony related to an investigation. Both witnesses refused to answer at least some of the grand jury's questions. At a hearing on September 13, 2012, the court held Mr. Duran in civil contempt and, at the Government's request, ordered him confined until he either agreed to testify or until the expiration of the grand jury's term. *See* 28 U.S.C. § 1826. The court ordered a status hearing for Mr. Duran on September 26, at which time

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1 he confirmed his refusal to testify and declined the court's offer to periodically hold
2 status hearings. At a September 27 hearing, the court found Ms. Olejnik in civil
3 contempt and ordered her confined until she either agreed to testify or until the expiration
4 of the grand jury's term. *See id.* Both witnesses unsuccessfully appealed the court's
5 contempt findings. Both witnesses remain confined at the Federal Detention Center in
6 SeaTac.

7 After five months of confinement, both witnesses reiterate their refusal to answer
8 the grand jury's questions, but both ask the court to release them on the ground that
9 continued confinement will not coerce their testimony.

10 III. ANALYSIS

11 When a witness unlawfully refuses to answer questions from a grand jury, a court
12 has authority to declare her in civil contempt. *Shillitani v. United States*, 384 U.S. 364,
13 370 (1966). In those cases, the purpose of confinement following a finding of civil
14 contempt is to coerce the witness's testimony. *Id.* at 371. The confinement must end, for
15 example, when the term of the grand jury expires (because the witness cannot testify
16 before a grand jury that does not exist), or when the witness chooses to testify. *Id.*

17 Due process also demands, however, that the court end confinement where it is
18 substantially likely that the witness's confinement is no longer coercive. *Lambert v.*
19 *Montana*, 545 F.2d 87, 91 (9th Cir. 1976). Confinement without the possibility of
20 coercing testimony is purely punitive, and falls within the realm of criminal law. *Id.* at
21 90. So far as the court is aware, the Government has not charged either Ms. Olejnik or
22 Mr. Duran with criminal contempt.

23 Several federal courts of appeal, including the Ninth Circuit, have offered
24 instruction on determining whether confinement for civil contempt has ceased to be
25 coercive. Each of them requires a court to conduct an individualized assessment of
26 whether the contemnor is likely to testify. *E.g., SEC v. Elmas Trading Corp.*, 824 F.2d

1 732, 733 (9th Cir. 1987); *Simkin v. United States*, 715 F.2d 34, 37 (2d Cir. 1983); *In re*
2 *Crededio*, 759 F.2d 589, 592 (7th Cir. 1985). The burden is on the contemnor to
3 persuade the court. *Simkin*, 715 F.2d at 37; *In re Grand Jury Investigation (Braun)*, 600
4 F.2d 420, 425 (3d Cir. 1979). Acknowledging that the Recalcitrant Witness Statute
5 places an eighteen-month limit on confinement for civil contempt, *see* 28 U.S.C.
6 § 1826(a), some courts urge reluctance in finding that confinement for fewer than
7 eighteen months has lost its coercive character. *Braun*, 600 F.2d at 427 (“[W]e are
8 reluctant to conclude, in the absence of unusual circumstances, that, as a matter
9 cognizable under due process, confinement for civil contempt that has not yet reached the
10 eighteen-month limit has nonetheless lost its coercive impact and become punitive.”); *see*
11 *also Simkin*, 715 F.2d at 37. All of these courts recognize, however, that a trial court has
12 discretion to decide whether periods of confinement of fewer than 18 months have lost
13 their power to coerce. *Elmas Trading*, 824 F.2d at 733; *Simkin*, 715 F.2d at 38 (“[W]e
14 think a district judge has virtually unreviewable discretion both as to the procedure he
15 will use to reach his conclusion, and as to the merits of his conclusion.”); *Braun*, 600
16 F.2d at 428; *Crededio*, 759 F.2d at 591.

17 Both Ms. Olejnik and Mr. Duran have provided extensive declarations explaining
18 that although they wish to end their confinement, they will never end their confinement
19 by testifying. The court finds their declarations persuasive. They have submitted to five
20 months of confinement. For a substantial portion of that confinement, they have been
21 held in the special housing unit of the Federal Detention Center at SeaTac, during which
22 they have had no contact with other detainees, very little contact even with prison staff,
23 and exceedingly limited ability to communicate with the outside world. Mr. Duran was
24 confined in the special housing unit for the first two weeks of his confinement, was
25 placed there again on December 27, and has remained there since. Ms. Olejnik spent the
26 first six days of her confinement in the special housing unit, was placed there again on

1 December 27, and remained there at least through February 12. The Government states
2 that she has recently been returned to general population. The Government does not
3 dispute the witnesses' assertions that confinement in the special housing unit entails 23
4 hours of solitary confinement in their cells and an hour of solitary time alone in a larger
5 room each day, a single fifteen-minute phone call each month (as opposed to five hours
6 of monthly phone time for detainees outside the special housing unit), and exceedingly
7 limited access to reading and writing material. Their physical health has deteriorated
8 sharply and their mental health has also suffered from the effects of solitary confinement.
9 Their confinement has cost them; they have suffered the loss of jobs, income, and
10 important personal relationships. They face the possibility of criminal convictions for
11 contempt. Ms. Olejnik plausibly explains, moreover, that she would face ostracism
12 within her community of friends if she were to testify, based on the experience of another
13 grand jury witness within her community who she believes chose to testify rather than
14 face continued confinement. Both she and Mr. Duran have nonetheless refused to testify.

15 The Government rebuts none of the assertions in Ms. Olejnik's or Mr. Duran's
16 declarations. The Government suggests no reason to disbelieve those assertions. The
17 Government suggests no particular reason for the court to conclude that there is a
18 substantial likelihood either witness will testify if the court continues their confinement.
19 Indeed, the court queries whether it can characterize the Government's opposition to their
20 motions as an opposition to their requests for release. The Government merely insists
21 that their written statements are insufficient to carry their burden, and that the court
22 should "hear from [each witness] and others to assess whether [he or] she has established
23 a due process violation."

24 The court finds no need to have the witnesses confirm their written statements at a
25 hearing. There is no reason to suspect their testimony at a hearing would be any different
26 (with respect to the central inquiry relevant to their release). The Government does not

1 suggest that the witnesses will testify differently, or will offer additional testimony
2 relevant to the coercive effective of their continued confinement. The court has observed
3 both Ms. Olejnik and Mr. Duran in their prior appearances before the court. Whatever
4 the merits of their choices not to testify, their demeanor has never given the court reason
5 to doubt their sincerity or the strength of their convictions. Courts have recognized that a
6 trial court need not follow any particular procedure when conducting the individualized
7 inquiry relevant to the release of a contemptuous witness. *E.g., Simkin*, 715 F.2d at 38
8 (“[W]e think a district judge has virtually unreviewable discretion both as to the
9 procedure he will use to reach his conclusion, and as to the merits of his conclusion.”);
10 *Braun*, 600 F.2d at 428 (finding no need for evidentiary hearing to assess coercive nature
11 of continued confinement).

12 The court cannot rule out all possibility that continued confinement would
13 convince the witnesses to testify, but it is not required to. The witnesses face
14 confinement that could last another thirteen months, and there is always the chance that
15 additional confinement will break the resolve of any contemnor. For these witnesses,
16 however, their resolve appears to increase as their confinement continues. Each of them
17 points out that to testify now would mean that the past five months of their confinement
18 was for naught. That conviction is unlikely to lessen as their confinement goes on.

19 Although the Government does not bear the burden here, the court notes that it has
20 not provided any evidence that continued confinement is likely to coerce testimony. It
21 has instead relied on the generalized notion that lengthier confinement is more coercive
22 than a shorter term of confinement. The court does not doubt the truth of that proposition
23 as a general matter, but it finds that Ms. Olejnik and Mr. Duran have shown that it no
24 longer applies to them.

25 The witnesses and the Government also invite the court to consider arguments
26 specific to the grand jury investigation at issue. The witnesses argue, for example, that

1 any testimony they could offer would be, at best, tangential to the investigation. They
2 contend that other jurisdictions have charged people for what the witnesses believe are
3 similar crimes without the need for tangential testimony. They also contend that the
4 duration of their confinement already exceeds the likely imprisonment of anyone who
5 might be convicted as a result of the grand jury's investigation. Each of these arguments,
6 however, strays from the court's central inquiry: are these witnesses likely to testify if
7 their confinement continues? The court observes, moreover, that the witnesses'
8 speculations about the grand jury investigation and its likely future course are a much
9 shakier foundation for their request for release than their personal statements about their
10 confinement, their principles, and the reasons that they will never provide testimony.

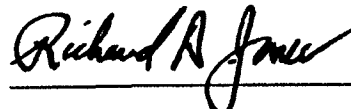
11 On this record, the court concludes that there is no substantial likelihood that
12 continued confinement would coerce Ms. Olejnik or Mr. Duran to testify. Although they
13 remain in contempt of court, the court finds no basis for their continued confinement.

14 IV. CONCLUSION

15 For the reasons previously stated, the court GRANTS the motions to terminate the
16 confinement of Ms. Olejnik and Mr. Duran. No. 12-GJ-145, Dkt. # 24; No. 12-GJ-149,
17 Dkt. # 35. The court also GRANTS Ms. Olejnik's motion to file an overlength brief. No.
18 12-GJ-145, Dkt. # 23.

19 The court orders that Ms. Olejnik and Mr. Duran are to be released from custody
20 no later than 4:00 p.m. on February 28, 2013. The court orders the Government to
21 provide the warden of the Federal Detention Center at SeaTac with notice of this order as
22 soon as possible.

23 DATED this 27th day of February, 2013.

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26 The Honorable Richard A. Jones
27 United States District Court Judge